Lembaga Kumpulan Wang Simpanan Pekerja v Shaharudin bin Omar & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–21–112 OF 2004
MOHD HISHAMUDIN J
14 FEBRUARY 2008

Civil Procedure — Summary judgment — Appeal against dismissal of — Whether triable issues raised

Companies and Corporations — Directors — Personal liability — Whether director personally liable when company failed to pay EPF contributions in respect of its employees — Whether EPF board must first prosecute defendant for criminal offence before instituting civil proceedings — Whether suit against defendant unlawfully instituted — Employees Provident Fund Act 1991 ss 14(3), 45, 46 43(2), 65 & 67

Labour Law — Provident fund — Failure to contribute — Whether director personally liable when company failed to pay EPF contributions in respect of its employees — Whether EPF board must first prosecute defendant for criminal offence before instituting civil proceedings — Whether only certain class of persons could commence suit against defendant's company — Employees Provident Fund Act 1991 ss 14(3), 45, 46 43(2), 65 & 67

The Employees Fund Board ('the board'), the plaintiff in this case, had commenced this writ action against the three defendants, who were at all material times the directors of a company known as Syarikat Long Huat Marketing Sdn Bhd ('the company'), to recover the unpaid EPF contributions in respect of the employees of the company due from the company. Although the company was the employer, the plaintiff's claim was based on s 46 of the Employees Provident Fund Act 1991 ('the Act'), which provides that where a company fails to pay the contributions, then, apart from the company, the directors are also jointly and severally liable for the failure to pay. In fact, the plaintiff had already obtained judgment against the first and second defendants but the application for summary judgment against the third defendant had been dismissed. This was the plaintiff's appeal against that decision. The third defendant relied on the triable issues that were raised in his application for summary judgment. The third defendant

contended, inter alia, that the plaintiff ought to have first prosecuted him for a criminal offence before instituting civil proceedings; that it was disputable whether the third defendant's company was actually liable to make the contributions; and that the suit against the third defendant was unlawfully instituted. The main issue before the court was therefore to consider whether the defendant had raised any triable issues.

Held, allowing the appeal with costs:

(1) Under s 65 of the Act, the board had a choice as to whether to prosecute the company, or its directors, for a criminal offence in respect of the company's failure to pay, or whether to institute civil proceedings against the company, or its directors. Therefore there was no merit in the defendant's contention that before a civil proceeding can be instituted against the directors to recover the unpaid contributions, the company or the directors must first be prosecuted for a criminal offence under the Act (see para 9).

(2) Neither was there any merit in the defendant's argument that s 46 of the Act is unconstitutional as the provision creates a 'strict liability' for the directors. This is not the case because firstly, s 46 does not create a strict liability offence and secondly, the board of directors of the company is the alter ego of the company, and therefore it is legally logical for s 46 of the Act to make the directors liable for any non-payment of the EPF contributions by the company (see para 11).

(3) Although the third defendant alleged that the employees named by the plaintiff were not the employees of the company, it did not furnish the court with any documentary evidence to support its claim whereas the plaintiff had produced convincing documentary evidence in its affidavit to show that the employees belonged to the company (see para 12).

(4) Further, the third defendant's contention that only three classes of persons had the legal authority to institute the present action against him and that therefore the firm of solicitors who had filed the present writ action had no legal authority to institute the present action against him, had no merit in it. This was because s 65(1) read together with s 14(3) empowers the board to legally utilise the services of a firm of solicitors for the purpose of instituting civil proceedings to recover civil debts (see paras 18 & 20).

[Bahasa Malaysia summary

Lembaga Dana Pekerja ('lembaga'), plaintif dalam kes ini, telah memulakan tindakan writ ini terhadap ketiga-tiga defendan, yang pada masa material

merupakan pengarah syarikat yang dikenali sebagai Syarikat Long Huat Marketing Sdn Bhd ('syarikat tersebut'), untuk mendapatkan kembali sumbangan EPF yang tidak dibayar berkaitan pekerja-pekerja syarikat tersebut yang kena dibayar oleh syarikat tersebut. Walaupun syarikat tersebut adalah majikan, tuntutan plaintif adalah berdasarkan kepada s 46 Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta tersebut'), yang memperuntukkan bahawa di mana syarikat gagal untuk membayar sumbangan, oleh itu, selain daripada syarikat tersebut, pengarah-pengarah juga adalah bertanggungjawab bersesama dan berasingan atas kegagalan membayar. Sebenarnya, plaintif telah memperolehi penghakiman terhadap defendan kedua dan ketiga tetapi permohonan untuk penghakiman ringkas terhadap defendan ketiga telah ditolak. Ini adalah rayuan plaintif terhadap keputusan tersebut. Defendan ketiga bergantung ke atas isu yang boleh dibicarakan yang dibangkitkan di dalam permohonan untuk penghakiman ringkasnya. Defendan ketiga berhujah, antara lain, bahawa plaintif sepatutnya mendakwanya untuk kesalahan jenayah terlebih dahulu sebelum memulakan prosiding sivil; bahawa ia adalah dipertikaikan sama ada syarikat defendan ketiga yang sebenarnya bertanggungjawab untuk membuat sumbangan tersebut; dan bahawa tindakan terhadap syarikat defendan ketiga dimulakan secara tidak sah. Isu utama di hadapan mahkamah adalah untuk mempertimbangkan sama ada defendan telah membangkitkan apa-apa isu yang boleh dibicarakan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Di bawah s 65 Akta tersebut, lembaga mempunyai pilihan sama ada untuk mendakwa syarikat tersebut, atau pengarah-pengarahnya untuk kesalahan jenayah berkaitan dengan kegagalan syarikat tersebut untuk membayar, atau sama ada untuk memulakan prosiding sivil terhadap syarikat tersebut, atau pengarah-pengarahnya. Oleh itu, tidak terdapat merit di dalam hujahan defendan bahawa sebelum prosiding sivil boleh dimulakan terhadap pengarah-pengarah untuk mendapatkan kembali sumbangan yang tidak dibayar, syarikat tersebut atau pengarah-pengarah mesti pertamanya didakwa untuk kesalahan jenayah di bawah Akta tersebut (lihat perenggan 9).

(2) Juga tidak terdapat apa-apa merit di dalam hujahan defendan bahawa s 46 Akta tersebut tidak berperlembagaan kerana peruntukan membentuk 'strict liability' untuk pengarah-pengarah. Ini tidak benar kerana pertama, s 46 tidak membentuk kesalahan liabiliti tegas dan kedua, lembaga pengarah syarikat tersebut adalah alter ego syarikat tersebut, dan oleh itu adalah logik dari segi undang-undang untuk s 46

Akta tersebut membuatkan pengarah bertanggungjawab terhadap apa-apa sumbangan EPF yang tidak dibayar oleh syarikat tersebut (lihat perenggan 11).

(3) Walaupun defendan ketiga mendakwa bahawa pekerja-pekerja yang dinamakan oleh plaintif bukan pekerja-pekerja syarikat tersebut ia tidak mengemukakan kepada mahkamah apa-apa keterangan dokumentar untuk menyokong tuntutannya sebaliknya plaintif telah mengemukakan keterangan dokumentar yang menyakinkan di dalam afidavitnya untuk menunjukkan bahawa pekerja-pekerja adalah pekerja syarikat tersebut (lihat perenggan 12).

(4) Selanjutnya, hujahan defendan ketiga bahawa hanya tiga kelas orang yang mempunyai kuasa di sisi undang-undang untuk memulakan tindakan ini terhadapnya dan oleh itu firma peguam yang memfailkan tindakan writ ini tidak mempunyai kuasa di sisi undang-undang untuk memulakan tindakan ini terhadapnya, tidak terdapat merit di dalamnya. Ini adalah kerana s 65(1) dibaca bersama dengan s 14(3) memberi kuasa kepada lembaga untuk menggunakan khidmat firma peguam secara undang-undang untuk tujuan memulakan prosiding sivil untuk mendapatkan kembali hutang-hutang sivil (lihat perenggan 18 & 20).]

Notes

For cases on failure to contributions to the provident fund, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1606-1607.

For cases on personal liability of directors, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 312–317.

For cases on summary judgment generally, see 2(3) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 6829–7620.

Cases referred to

KM Nathersahib & Another v Meyer Bros [1940] MLJ 252 (distd)

Legislation referred to

Employees Provident Fund Act 1991 ss 3, 14(3), 43(2), 45, 45(1), 46, 46(1), 63, 65, 65(1), 65(2), 67
Rules of the High Court 1980 O 14

Latipah Husin (Mazwan Pathma & Co) for the plaintiff.
Bernard Gomez (Bernard Gomez & Co) for the defendant.

Mohd Hishamudin J:

[1] Enclosure 24 is an appeal to the judge in chambers by the plaintiff

against the decision of the learned senior assistant registrar who had dismissed the plaintiff's application for an O 14 of the Rules of the High Court 1980 summary judgment against the third defendant (judgment has already been obtained against the first and second defendant).

[2] The plaintiff, the Employees Provident Fund Board ('the board'), has commenced this writ action against the defendants, who at the material time were directors of a company known as Syarikat Long Huat Marketing Sdn Bhd ('the company'), to recover unpaid EPF contributions in respect of the employees of the company due from company. The amount of contributions claimed is RM388,800.

[3] The liability of the company to pay the EPF contributions is found in s 45 of the Employees Provident Fund Act 1991 ('the Act'). Subsection (1) of s 45 reads:

> Payment of contributions.
>
> (1) Except where otherwise provided in this Act, the employer shall, in the first instance, be liable to pay both contributions payable by himself and also, on behalf of and to the exclusion of the employee, the contributions payable by that employee; and for the purposes of this Act contributions paid by an employer on behalf of an employee shall be deemed to be contributions by the employee.

[4] For the purposes of the Act, the company is an 'employer' (see s 3 of the Act, in particular, the definition of 'employer'). But where a company fails to pay the contributions, then, apart from the company, the directors of the company are also liable for the failure to pay. This is provided for by s 46 of the Act. Subsection (1) of s 46 reads:

> Joint and several liability of directors, etc.
>
> 46(1) *Where any contributions remaining unpaid by a company, a firm or an association of persons, then, notwithstanding anything to the contrary in this Act or any other written law, the directors of such company including any persons who were directors of such company during such period in which contributions were liable to be paid*, or the partners of such firm, including any persons who were partners of such firm during such period in which contributions were liable to be paid, or the office bearers of such association of persons, including any persons who were the office bearers of such association during such period in which contributions were liable to be paid, as the case may be, *shall together with company*, firm or association of persons liable to pay the contributions, *be jointly and severally liable for the contributions due and payable to the Fund.*
>
> (Emphasis added.)

[5] The appeal that is now before me only concerns the third defendant (as pointed out earlier, judgment has already been obtained against the first and second defendants). A

[6] I had allowed the appeal with costs, and I now give my grounds. B

[7] In my judgment there are no triable issues. The third defendant argues that there are four triable issues. But I find no merits in the arguments advanced by his counsel before me. I shall deal with the suggested issues one by one. C

Whether the plaintiff must first prosecute the defendant for a criminal offence before instituting civil proceedings

[8] It is true that under s 43(2) of the Act, the company (or its directors) can be prosecuted for the failure to pay the contributions. However, I find there is no merit in the contention that before a civil proceeding can be instituted against the directors to recover the unpaid contributions, the company or the directors of the company must first be prosecuted for a criminal offence under the Act in respect of the failure to pay the contributions. On the contrary, s 65(1) of the Act implies that a civil proceeding can be instituted against the directors independently of any criminal prosecution against the company or the directors. Subsection (1) of s 65 provides: D E F

> Civil proceedings to recover contributions.
>
> 65(1) Notwithstanding the provisions of any written law all contributions payable under this Act may, without prejudice to any other remedy, be recoverable by the board summarily as a civil debt.

G

[9] In my view, under the scheme of the Act, the board has a choice: the board can either prosecute the company (or its directors) for a criminal offence in respect of the company's failure to pay, or to institute a civil proceeding against the company (or its directors). However, if the board were to choose to institute criminal proceedings then the mode of recovery of the unpaid contributions would be by the procedure as prescribed by s 63 of the Act. H

[10] The case of *KM Nathersahib & Another v Meyer Bros* [1940] MLJ 252 cited by learned counsel for the defendant is irrelevant as the facts there are different from the facts in this case. The case does not concern the Act. Moreover, it must be noted that the broad proposition of law as cited by counsel for the defendant, that is: I

A When an act is both a crime and a civil wrong, prosecution for the criminal offence is generally a condition precedent to a civil action in tort at any rate in the case of a non-compoundable offence.

is merely an extraction from the head-notes of the case as reported in the law B report. I have serious doubts as to whether what is stated in the head-notes of the case is truly the ratio decidendi of that case.

Whether s 46 of the Act is unconstitutional

C **[11]** It is argued by the defence that s 46 of the Act is unconstitutional as that provision creates a 'strict liability' for the directors. I see no merit in this argument. In the first place s 46 does not create a strict liability offence. Secondly, the board of directors of a company is the alter ego of the company. Hence, it is logical legally for s 46 to make the directors liable for any D non-payment of EPF contributions by the company.

Whether it is the defendant's company that is liable to make the contributions

E **[12]** The third defendant contends that the company, Syarikat Long Huat Marketing Sdn Bhd, is not the company that is liable to pay the salary of the employees named. The third defendant argues that the employees named by the plaintiff are not the employees of the defendant, but the employees of a company known as Long Huat Group Bhd. There is no merit in this F contention too. The third defendant does not furnish the court with any documentary evidence to support his claim that the employees named are the employees of Long Huat Group Bhd and not the employees of Syarikat Long Huat Marketing Sdn Bhd. The plaintiff, on the other hand, in their affidavit evidence produces convincing documentary evidence to show that the G employees belonged to Syarikat Long Huat Sdn Bhd.

Whether the suit against the third defendant was unlawfully instituted

H **[13]** It is to be observed that the present writ action was filed by a firm of solicitors, Messrs Mazwan Pathma & Co. Now, it is the contention of the third defendant that by reason of ss 65 and 67 of the Act only:

(a) a federal counsel authorised by the Attorney General;

I (b) a legal officer of the board authorised by the chairman of the board; or

(c) an officer of the board authorised by the chairman of the board,

may institute the present legal proceeding against the third defendant. Any other person, such as a firm solicitors, cannot legally do so.

[14] Section 67 of the Act stipulates:

> Conduct of civil proceedings.
>
> 67 Notwithstanding the provisions of any written law, but without prejudice to section 65, in any civil proceedings by or against the Board —
>
> (a) any person holding the appointment of a Federal Counsel and authorized by the Attorney General for the purpose; or
>
> (b) any legal officer of the Board authorized in that behalf by the Chairman,
>
> may, on behalf of the board, institute, appear in and conduct such proceedings and may make and do all appearances, acts and applications in respect of such proceedings.

[15] Section 65(2) of the Act states:

> (2) Proceedings for the summary recovery as civil debts of contributions may be instituted by any officer authorized in that behalf by special or general directions of the Chairman and any such officer may conduct such proceedings.

[16] It is submitted by counsel for the third defendant that the firm of solicitors, Messrs Mazwan Pathma & Co, who has filed the present writ action, has no legal authority to institute the present action against the third defendant. With respect, I am unable to accept this argument. First and foremost, one thing must be clear in our minds to avoid any confusion: just because the writ and statement of claim (as well as other cause papers) are filed by the said firm of solicitors, it cannot be concluded that the said firm of solicitors *on their own volition* is instituting the proceedings against the third defendant. These proceedings are in fact instituted by the board and not by the firm of Messrs Mazwan Pathma & Co. The said firm of solicitors is only acting on behalf of the board, that is, the plaintiff. Indeed, the writ and statement of claim (as well as all other cause papers) are endorsed at the end with the words:

> PERNYATAAN TUNTUTAN INI difailkan oleh Tetuan Mazwan Pathma & Co Peguamcara bagi plaintiff yang dinamakan di atas yang mempunyai alamat penyampaian …

[17] That Messrs Mazwan Pathma & Co is employed by the board/plaintiff to file the action and to act on behalf of the board in the present proceedings is confirmed by the affidavit evidence of the board's legal officer at encl 23.

[18] It is true that under the scheme of the Act the power to institute legal proceedings to recover civil debts due to the board is, apart from the board, also vested in the three classes of persons just mentioned. However, under the Act, the board may also employ solicitors for the purpose of instituting or conducting court proceedings to recover unpaid contributions. That the board has such a power can be gathered by reading s 65(1) together with s 14(3). Section 65(1) states:

> 65 Civil proceedings to recover contributions
>
> (1) Notwithstanding the provisions of any other written law all contributions payable under this Act may, without prejudice to any other remedy, be recoverable by the board summarily as a civil debt.

[19] Section 14(3) provides:

> 14 Powers and duties of the Board
>
> ...
>
> (3) The Board may employ and pay agents, advocates and solicitors, bankers, stockbrokers or any other persons, to transact any business or do any act required to be transacted or done in the exercise of its powers or in the carrying out of its duties or for the better carrying into effect of the purposes of this Act.

[20] The third defendant also seems to suggest that the board legally cannot utilise the services of a firm of solicitors for the purpose of instituting civil proceedings to recover civil debts, and that by reason of s 67 of the Act the board can only make use of the services of its legal officers and of federal counsel for such purposes. With respect, I am unable to accept such a contention. In my judgment the provision of sub-s (3) of s 14 is sufficiently wide so as to empower the board to employ 'advocates and solicitors … to do any act required to be … done in the exercise of its powers or in the carrying out of its duties …'. The phrase 'the exercise of its powers' here certainly would include the power of the board to recover summarily civil debts as conferred on the board by sub-s (1) of s 65.

Appeal allowed with costs.

Reported by K Nesan